APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRUCE C. BEREANO, Defendant-Appellant.	)	No. 95-5312
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. BRUCE C. BEREANO, Defendant-Appellee.	)	No. 95-5395

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CR-94-208-WN)

Argued: December 5, 1997

Decided: August 28, 1998

Before WILLIAMS, Circuit Judge, WILSON, Chief United States District Judge for the Western District of Virginia, sitting by designation, and MORGAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part and vacated and remanded as to sentencing by unpublished opinion. Judge Morgan write the majority opinion, in which Judge Williams joined. Chief Judge Wilson wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: M. Albert Figinski, Stuart Ross Berger, WEINBERG & GREEN, L.L.C., Baltimore, Maryland, for Appellant. Dale Preston Kelberman, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** Lynne A. Battaglia, United States Attorney, Stephen S. Zimmerman, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

MORGAN, District Judge:

On May 26, 1994, Bereano, an attorney and a registered Maryland lobbyist, was charged with eight counts of mail fraud. On November 30, 1994, the jury found Bereano

guilty on seven counts of mail fraud.[1] Four of Bereano's lobbying clients were billed $150.00 each for "legislative entertainment" in their September 1, 1990 bills; those amounts were found to actually represent reimbursements for unauthorized campaign contributions. Bereano appeals, arguing first that there was insufficient evidence to support a conviction of mail fraud under 18 U.S.C. § 1341 (1994), second that the indictment insufficiently pled violations of 18 U.S.C. § 1346 (1994), third that the trial court abused its discretion in permitting the Government to offer evidence of Maryland state election laws to prove the defendant's motive and intent, fourth that the trial court erred in denying defendant's motion for individualized voir dire, and finally that the trial court improperly allowed the Government to use a witness's grand jury testimony as evidence. The Government cross-appeals, arguing first that the trial court erred in refusing to enhance the defendant's sentence for "losses" incurred of more than $10,000 and second that the trial court erred in departing downward from the applicable sentencing guidelines range by two levels. For the reasons that follow, we affirm the judgment of the district court in part and vacate and remand as to sentencing.

I.

On May 26, 1994, the Grand Jury returned an eight count indictment charging Bereano with mail fraud under 18 U.S.C. §§ 1341 and 1346. The indictment was predicated on two theories, the knowing and willful scheme: (1) to defraud clients of money and property by submitting bills

---

[1] Count 8 was dismissed pursuant to Bereano's motion for a judgment of acquittal.

which included false statements of expenses incurred and (2) to defraud clients of their right to Bereano's honest and loyal services. The indictment described a three-part scheme: (1) Bereano requested employees of the law firm of Bereano & Resnick and various family members to draw checks for political contributions which were distributed to candidates through Bereano's political action committee ("PAC"); (2) the employees and family members received reimbursements through checks from Bereano's law firm often with false notations concerning the check's true purpose; and (3) the reimbursements were pro-rated among Bereano's lobbying clients under the heading of "legislative entertainment." The retainer agreements between Bereano and his lobbying clients did not include authorization to make such contributions. The clients only agreed to pay Bereano a fixed retainer for his lobbying services and "reasonable and necessary expenses," such as photocopying, long distance phone calls, and "legislative entertainment," which Bereano defined as meals and entertainment, including sports events and concerts.

Prior to trial, several in limine motions were presented concerning which testimony would be admissible at trial. The use of Maryland state election laws was an issue included in the limine motions. The trial court determined that a violation of Maryland state election laws was both unnecessary and insufficient to prove mail fraud violations, thereby precluding the defendant from proving and arguing his compliance with same. However, in the course of trial, the court found that the state election laws could properly be admitted to show Bereano's intent and motive. Evidence concerning the Maryland election laws was admitted through two means. First, during its case in chief, the Government offered Exhibit 155 which was a letter written by Bereano to

one of his clients explaining the Maryland election laws as he understood them, and the letter had the relevant copies of the statutes attached. The letter with attachments was admitted into evidence. During Bereano's motion for judgment of acquittal, the Government argued that the letter was relevant to show what Bereano knew of the Maryland election laws. The trial court allowed the letter and the Maryland election statutes to be presented to the jury and instructed the jury that the laws were relevant to Bereano's motive and intent only.

Second, during closing remarks, the Government again made several references to the Maryland election laws. The prosecutor even stated that Bereano violated those laws. After the trial concluded with guilty verdicts, defense counsel again moved for a judgment of acquittal or, alternatively, for a new trial in response to these remarks. The trial court denied the motion, but stated that the amount of harm shown at the trial was "de minimis."

Another issue prior to trial concerned voir dire. Bereano requested extended and individual voir dire based upon allegedly adverse publicity targeted at Bereano's lobbying practices and at lobbyists generally. The trial court rejected Bereano's request. The procedure followed at trial involved three steps. First, the trial judge asked the entire jury pool general questions concerning media exposure and potential biases. Second, those responding affirmatively to general questions directed to the whole panel were questioned individually about potential biases against lobbyists and several individuals voiced negative opinions about lobbyists. However, none of those individuals with negative opinions were chosen for jury service. Third, after completing the individual questioning of selected veniremen, the trial judge

then repeated questions relative to lobbyists to the panel as a whole.

The grand jury testimony at issue was given by Sandra Steed O'Hearn, Bereano's bookkeeper and manual biller of lobbying clients. O'Hearn testified before the grand jury that Bereano instructed her to bill his lobbying clients for a pro-rated portion of various political contributions under the category of legislative expenses. At trial, O'Hearn denied that a policy, plan or scheme existed for falsely billing clients, and the prosecution impeached her by reading certain questions and answers from her grand jury testimony. O'Hearn testified that she did not remember such testimony before the grand jury. The grand jury transcript was never shown to O'Hearn, despite several requests by her and her attorney made prior to trial,[2] and the transcript was not entered into evidence at trial.

Other testimony at the trial included each alleged victim testifying that they perceived no fraud either in 1990 when they paid their fraudulent bills or at the time of the court proceedings.[3] However, the clients also testified that they never authorized Bereano to make political contributions nor did they agree to pay them. While O'Hearn testified that not all expenses entered into the computer were necessarily billed to clients, several of Bereano's employees testified to

---

[2] The Government further asserts that defense counsel had a copy of O'Hearn's grand jury testimony. Bereano's motion in limine on this issue supports this contention in that defense counsel complains that the prosecution did not identify the pages he was reading from enabling defense counsel to "follow along and identify the accuracy of his quotation of the grand jury testimony."

[3] These same clients also testified at Bereano's sentencing hearing that they did not feel victimized.

writing checks to Bereano's PAC for which they were later reimbursed. However, none of these employees knew whether any lobbying client was billed for the political contributions made. Finally, there was documentary evidence admitted at trial including: (1) the two check stubs for reimbursements to O'Hearn with names of Bereano's clients listed on the stubs and "#110 per BCB," which is the billing code for legislative entertainment and Bereano's initials; (2) checks to Bereano's PAC by firm employees and family members and checks reimbursing those employees for contributions made; (3) computer generated cash flow reports marking various reimbursements and legislative entertainment expenses as "billed off;" (4) bills to clients noting legislative entertainment expenses with no corresponding explanation; and (5) letters written by Bereano to clients explaining his understanding of Maryland election laws and including copies of those laws.[4]

The jury found Bereano guilty of all seven counts of mail fraud. On April 21, 1995, the district court entered a judgment of conviction on all seven counts and sentenced Bereano to a five year term of probation with six months of that time to be served in community confinement, 500 hours of community service and a fine of $20,000. The sentence was imposed as to each of the seven counts of conviction, with all sentences to run concurrently. Further, a special assessment of $350 was imposed. However, the court granted Bereano a stay of the sentence pending appeal based upon its observation that this case "is a close case" with a "number of appellate issues" which warranted a stay.

---

[4] The admission of this evidence is assigned as error by Bereano and the jury was instructed to consider it only as evidence of Bereano's motive and intent.

II.

In reviewing the sufficiency of the evidence, the appellate court "will sustain the jury's verdict 'if there is substantial evidence, taking the view most favorable to the Government, to support it.'" *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997) (quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942)). "Substantial evidence is evidence that a reasonable finder of fact would accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*

In order to establish the crime of mail fraud, the Government must prove a scheme to defraud and the use of the mails in the execution of that scheme. *See Periera v. United States*, 347 U.S. 1, 8 (1954). In addition, the Government must establish that Bereano acted with the requisite intent to defraud. The scheme to defraud must be intended to deprive the victims of money or property, *see McNally v. United States*, 483 U.S. 350, 355 (1987), or their right to honest services. *See United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1995); 18 U.S.C. § 1346 (1994). While the Government must prove an intent to defraud, it is not necessary for the Government to establish that the victim actually suffered a loss, only that Bereano intended such. *See United States v. Barber*, 668 F.2d 778, 784-85 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982).

Bereano argues that this circuit should follow the lead of the Second Circuit and hold that more than a mere intent to deceive his clients is required. Instead, Bereano argues the Government must prove an actual intent to defraud and some type of contemplated harm which Bereano asserts does not exist in this case. *See United States v. Starr*, 816 F2d. 94, 98 (2d Cir. 1987); *United States v. Regent Office Supply Co.*,

421 F.2d 1174, 1182 (2d Cir. 1970); *United States v. D'Amato*, 39 F.3d 1249, 1256-57 (2d Cir. 1994). This Circuit has not held that contemplated harm is necessary in order to establish mail fraud. *See United States v. Butler*, 704 F. Supp. 1351, 1354 (E.D. Va. 1989) (noting that the view that a finding of "contemplated harm" is required was adopted by the Second Circuit only "and is in opposition to the rule in the majority of the Circuits. The Court does not agree that this situation represents so significant a split in the Circuits that the Fourth Circuit's eventual view is doubtful."), *aff'd*, 905 F.2d 1532 (4th Cir.), *cert. denied*, 498 U.S. 900 (1990). Other Circuits are split as to whether contemplated harm is necessary.[5] Yet, regardless of the

---

[5] Some circuits have followed the Second Circuit's lead and required some contemplated harm to be present to establish intent to defraud. *See, e.g., United States v. Cochran*, 109 F.3d 660, 668 (10th Cir. 1997) ("We acknowledge that where actual harm exists as a natural and probable result of a scheme, fraudulent intent may be inferred. But we agree that in the absence of actual or potential harm, evidence independent of the alleged scheme must be adduced to show fraudulent intent towards the alleged victim." (citations omitted)); *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) ("'the scheme to defraud need not have been successful or complete. Therefore, the victims of the scheme need not have been injured. However, the Government must show that some actual harm or injury was contemplated by the schemer.'" (emphasis in original) (quoting *D'Amato*, 39 F.3d at 1257)), *cert. denied*, --- U.S. ---, 117 S.Ct. 2452 (1997); *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir. 1993) ("The element of fraudulent intent, in turn, requires a showing that defendants contemplated or intended some harm to the property rights of their victims."); *United States v. St. Gelais*, 952 F.2d 90, 95 (5th Cir.) ("'Only a showing of intended harm will satisfy the element of fraudulent intent.'" (quoting *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987))), *cert. denied*, 506 U.S. 965 (1992); *United States v. Utz*, 886 F.2d 1148, 1150 (9th Cir. 1989) (requiring "an intent to obtain money or property from the victim of the deceit." (citations and internal quotation marks omitted)), *cert. denied*, 497 U.S. 1005 (1990).

Other Circuits have held that no contemplated harm must be shown. *See United States v. Frost*, 125 F.3d 346, 354 (6th Cir. 1997) ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud . . .; "a scheme to defraud must involve [i]ntentional fraud, consisting in

(Continued...)

standard adopted, the Government argues and we agree that contemplated harm is present in this case. The contemplated harm is Bereano's fraudulent transfer to his clients of his cost of doing business which cost took the form of political contributions. The result would be the same if a different element of the cost of doing business was involved. For example, if he had apportioned his office rent among his clients under the heading of legislative entertainment, the contemplated harm element, if required, would have been satisfied. Therefore the evidence was sufficient to convict Bereano of § 1341 mail fraud violations.

Bereano relies on statements of the victims that no harm has occurred in arguing that no contemplated harm is present. Such issues are not decided at the whim of the perceived victim. The perception of the victim or target of the scheme is ultimately irrelevant to whether Bereano devised a scheme, or acted with the requisite intent to defraud. *See United States v. Brien*, 617 F.2d 299, 311 (1st Cir.) ("If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts. The only issue is whether there is a plan, scheme or artifice intended to defraud."), *cert. denied*, 446 U.S. 919 (1980); *see also United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (same); *United States v. Bryza*, 522 F.2d 414, 422

(...Continued)
deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed." (citations and internal quotation marks omitted)). Still others have merely defined the intent to defraud as "an intent to mislead the victim by inducing an uninformed consent to part with money or property." *United States v. Allard*, 926 F.2d 1237, 1242 (1st Cir. 1991) (citations omitted).

(7th Cir. 1975) (employee may be convicted of defrauding employer of "honest and faithful services" even if victim took no retributive action and was satisfied with defendant's performance. "[T]he defendant's intent must be judged by his actions, not the reaction of the mail fraud victims."), *cert. denied*, 426 U.S. 921 (1976). *But see D'Amato*, 39 F.3d at 1257 (holding that because alleged corporate victims had no complaints about Bereano's [*sic*] billing or about the services, perceived no fraud and felt no harm, the lawyer, by disguising the nature of his services on bills sent to his clients, merely deceived the clients as opposed to defrauding them).

Further, while his clients argue that they were satisfied with Bereano's services, they also testified that they did not authorize and would not have knowingly paid for the political contributions Bereano made. In support of this testimony, the client's retainer agreements only called for payment of Bereano's lobbying services and to reimburse him for "necessary and reasonable expenses," including "legislative entertainment." "Legislative entertainment" was defined as wining and dining legislators, providing tickets to sporting events, and the like. The retainer agreements do not authorize Bereano to make political contributions, nor did the clients authorize such expenses by any other means.

Sending a false bill to a third party through the mails with the necessary criminal intent is a classic violation of the mail fraud statute. *See United States v. Alexander*, 748 F.2d 185 (4th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *United States v. Perkal*, 530 F.2d 604 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976). Accepting the reasonable inferences in favor of the Government, the totality of the evidence presented is sufficient to support a finding that Bereano had a specific intent to defraud, including contemplating harm to

his clients, thereby supporting his conviction on the seven mail fraud counts under § 1341.

III.

Federal Rule of Criminal Procedure 7(c)(1) requires that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In order for the indictment to be sufficient, the Court of Appeals must not find that "the indictment as a whole is so vague that it violates defendants' rights." *United States v. American Waste Fibers Co., Inc.*, 809 F.2d 1044, 1046 (4th Cir. 1986). Whether an indictment properly charges an offense "is a matter of law which we may consider de novo if Bereano made a timely objection to the indictment." *United States v. Darby*, 37 F.3d 1059, 1062 (4th Cir. 1994), *cert. denied*, 514 U.S. 1097 (1995).

Bereano begins by challenging the sufficiency of the indictment. "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also Darby*, 37 F.3d at 1063 ("An indictment must contain the elements of the offense charged, fairly inform a defendant of the charge, and enable Bereano to plead double jeopardy as a defense in a future prosecution for the same offense. . . . Moreover, the indictment must include every essential element of an offense, or else the indictment is invalid; and mere reference to the applicable statute does not cure the defect." (citations and internal quotation marks omitted)). Further, "[t]he indictment may incorporate the words of the statute to set forth the offense, but the statutory language 'must be

accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.'" *United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993) (quoting *Hamling*, 418 U.S. at 117-18.)

First, Bereano argues that because he never held public office, "application of § 1346 to him overreached constitutional bounds." However, there is no indication that § 1346 only applies to public officials. Section 1346 of the same statute reads "For the purposes of this Chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

The plain language of the statute does not restrict its application to public officials. Further, § 1346 was a response by Congress to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). Prior to *McNally*, numerous circuit courts, including this Circuit, held that the mail fraud statute covered not only schemes to defraud others of property, but also schemes designed to defraud others of "intangible rights," including the public's right to honest government. *See McNally*, 483 U.S. at 356. In addition to the right to honest Government, pre-*McNally* cases held that the intangible rights covered included an employer's or other principal's right to the honest, faithful and disinterested services of its employees or agents, usually involving a breach of a fiduciary duty. Specific examples include cases where courts found a violation of the "honest and faithful services" right where an employee took kickbacks from third parties, embezzled company funds, owned a hidden interest in a firm with which his company did business, or traded in the securities market with inside information. *See, e.g., United States v. Dial*, 757 F.2d 163,

168-69 (7th Cir.), *cert. denied*, 474 U.S. 838 (1985); *United States v. Lemire*, 720 F.2d 1327, 1335-36 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States v. Seigel*, 717 F.2d 9, 14 (2d Cir. 1983); *United States v. Bohunus*, 628 F.2d 1167, 1174-75 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States v. McCracken*, 581 F.2d 719, 721-22 (8th Cir. 1978).

McNally attempted to limit the definition of "honest and faithful services," but this Circuit has held that Congress meant to return the definition to its pre-*McNally* scope through enacting § 1346. *See Bryan*, 58 F.3d at 942; *United States v. ReBrook*, 58 F.3d 961, 966-67 (4th Cir.), *cert. denied*, 516 U.S. 970 (1995). Thus, the "honest and faithful services" concept embodied in the statute covers not only circumstances where an agent defrauds his principal by stealing money from the principal, but also where an agent defrauds his principal of his "honest and faithful services" when he breaches his fiduciary duty and conceals material information from his principal, coupled with the necessary intent and use of the mails and wires. *See, e.g., United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991), *cert. denied*, 508 U.S. 939 (1993); *United States v. Ballard*, 663 F.2d 534, 541 (5th Cir. 1981); *United States v. Von Barta*, 635 F.2d 999, 1006 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *United States v. ReBrook*, 837 F. Supp. 162, 167-68 (S.D. W. Va. 1993), *aff'd in part and rev'd in part*, 58 F.3d 961 (4th Cir.), *cert. denied*, 516 U.S. 970 (1995). Therefore, § 1346 is not limited to public officials.

Second, Bereano focuses on the requirement that the breach must be material and that there must be an intent to defraud. *See, e.g., Cochran*, 109 F.3d at 667 ("[I]t would

give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing. . . . [Therefore,] § 1346 must be read against a backdrop of the mail and wire statutes, thereby requiring fraudulent intent and a showing of materiality." (citations omitted)); *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990) ("However, not every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud.... Nor does a breach of contract in itself constitute a scheme to defraud. . . . Rather, the scheme must be intended to deceive another, by means of false or fraudulent pretenses, representations, promises or other deceptive conduct. (citations omitted)), *cert. denied*, 498 U.S. 992 (1990); *Mandel*, 591 F.2d at 1363 ("Thus, the breach of fiduciary duty must be linked with some actionable fraud in order for the proscriptions of the mail fraud statute to apply."); *United States v. Venneri*, 736 F.2d 995, 997 (4th Cir. 1984) ("'Any breach of fiduciary duty by a corporate employee effected in part by the use of the mails may be a violation of the federal mail fraud statute, at least when accompanied by concealment or a failure to disclose relevant material information.'" (quoting *United States v. Shamy*, 656 F.2d 951, 957 (4th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), *vacated on other grounds*, 886 F.2d 743 (4th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984))); *United States v. Feldman*, 711 F.2d 758, 763 (7th Cir. 1983) ("Yet not every breach of duty by an employee works as a criminal fraud, . . . and receipt of secret profits, standing alone, cannot support a mail fraud conviction. . . . . Such activities must be accompanied by a scheme formed with the intent to defraud. . . . . When an employee breaches a fiduciary duty to disclose information to his employer, that breach of duty can support a mail or wire fraud conviction only if the non-

disclosed information was material to the conduct of the employers business and the nondisclosure could or does result in harm to the employer." (citations omitted)); *United States v. Hess*, 591 F.2d 1347, 1363 (4th Cir. 1979) ("Thus, the breach of fiduciary duty must be linked with some actionable fraud in order for the proscription of the mail fraud statute to apply."). Such an argument is a challenge to the sufficiency of the evidence.

Reviewing the evidence in the light most favorable to the Government, there is a reasonable basis for finding that the issue of billing clients for unauthorized contributions to candidates was material. While Bereano's clients testified that they were indeed satisfied with Bereano's services, they also testified that they had not authorized contributions made to political candidates. Their understanding of the contents of "legislative entertainment" did not include these political contributions. Some clients further testified that the candidates to whom Bereano contributed were ones the clients specifically declined to support or were candidates opposed to ones the clients did support. However, it is not an element of the offense for the Government to prove that his clients would have likely contested the bills when they were first received had the clients known the true content of "legislative entertainment." The clients were billed for expenditures which they did not authorize and billed under a fraudulent category. This evidence is sufficient to uphold a finding of materiality.

To the extent that Bereano is claiming the indictment is too vague in its allegations of honest services, such issue was rejected by this Court in *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995). In *Bryan*, a public official argued that the indictment failed to allege an independent specific statute or regulation violated as part of the mail fraud scheme. *See*

id. at 940. Alternatively, Bryan argued that in the absence of such a statute or regulation, he had no way of knowing that his conduct would be deemed criminal. *See id.* at 941. The Court rejected this argument, holding that there was sufficient definition to the "deprivation of the intangible right of honest services" concept developed in the courts to put Bereano on notice. *See id.* at 941-42. The Court noted that "[t]o the extent that this amounts to an argument that § 1346 should be declared void for vagueness, we are unpersuaded." *Id.* at 941. Based on our prior decisions, the statute is not too vague to put Bereano on notice of the charges he faces.

As the trial court concluded, the indictment sufficiently alleges a scheme to defraud under § 1346. The indictment alleges that Bereano was an attorney and lobbyist who was retained by various clients to represent their interests. Indictment, ¶ 1, 3. As such, the indictment alleges he owed "a fiduciary duty to each of his lobbying clients to act honestly and faithfully for and on behalf of the clients." Indictment, ¶ 3. The indictment alleges that Bereano defrauded those clients of not only property, but his "honest and faithful services" as well. Indictment, ¶ 7(b). The indictment describes Bereano's scheme to defraud in that he submitted fraudulent bills to his clients, which misrepresented payments he made to reimburse others for nominee campaign contributions they made at Bereano's behest. Indictment, ¶ 8-16. Specifically, ¶ 16 alleges that Bereano "falsely represented to his lobbying clients on their periodic bills the expenses actually incurred on their behalf, by fraudulently including in those bills the amounts of the repayment checks used to reimburse the employees and family members for political contributions, which were falsely billed to clients as, among other things, legislative

entertainment." The indictment further describes how Bereano concealed this material information from his clients, such as concealing his identity as a contributor. Indictment, ¶ 18. Further, in response to Bereano's argument that somehow all the allegations in paragraphs 8-16 only describe the scheme to defraud under § 1341 described in ¶ 7(a), there is no delimitation as to what ¶ 8-16 refers. Paragraphs 8-16 follow the descriptions in both ¶ 7(a) referring to § 1341 and ¶ 7(b) referring to § 1346 or § 1341. There is no heading specifically describing ¶ 8-16 as acts only supporting § 1346. When the indictment is read as a whole, therefore, it is a "plain, concise and definite statement of the facts constituting the offense" as the indictment asserts Bereano's fiduciary duty and asserts that he falsely billed his clients. Therefore, the indictment contained the elements of the offense and met the requirement to fairly inform Bereano of the charges against him.

Further, even if the indictment lacked sufficient particularity as to § 1346, or there was insufficient evidence to uphold a conviction for mail fraud based on this section, the conviction will be affirmed when another sufficient basis for the conviction exists. *See Griffin v. United States*, 502 U.S. 46, 52-60 (1991); *United States v. McDonough*, 56 F.3d 381, 390 (2d Cir. 1995) (conviction under mail fraud indictment will stand if evidence indicates statute violated in either of two ways charged). In this case, there was sufficient evidence for conviction under § 1341.

IV.

A.

Bereano argues that the trial court erred in admitting evidence concerning Maryland election laws.[6] The trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *See United States v. Heater*, 63 F.3d 311, 320 (4th Cir. 1995), *cert. denied*, 516 U.S. 1083 (1996).

This Circuit previously has concluded that a prosecution for mail fraud does not require the Government to establish proof of any violation of an underlying state law or regulation. *See Bryan*, 58 F.3d at 940. However, evidence of state election laws may be admissible to show knowledge and intent. *See United States v. Grubb*, 11 F.3d 426, 433 (4th Cir. 1993) (evidence of the judicial canon of ethics was admissible and relevant to prove intent and absence of mistake, when coupled with an appropriate limiting instruction); *United States v. Reamer*, 589 F.2d 769, 770 (4th Cir.) (evidence of state law and Code of Professional Responsibility admissible to prove intent in trial against attorney for mail fraud), *cert. denied*, 440 U.S. 980 (1978);

---

[6] Bereano also argues that the Government implied that Bereano had committed perjury. Any implication by the Government in closing argument that Bereano had committed perjury by submitting false campaign contribution reports is reviewed for plain error as the first objection made concerning this issue was on appeal. *See United States v. Mitchell*, 1 F.3d 235, 242 (4th Cir. 1993); *St. Gelais*, 952 F.2d at 95. "To establish plain error, [a defendant] must establish that (1) the asserted defect in the trial was, in fact, error; (2) the error was plain; and (3) the error affected his substantial rights." *Jackson*, 124 F.3d at 614 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). Any implication made was within the context of what Bereano's motive and intent were. Therefore, no plain error exists for admitting the evidence on this basis.

United States v. Morlang, 531 F.2d 183, 191-92 n.16 (4th Cir. 1975) (holding the standard of conduct of HUD employees in trial of HUD director admissible).

In response to objections made in this case to the prosecutor's closing arguments, the trial judge ruled the "[prosecutor] was very circumspect in the way he approached it and that he did not cross the line." All references to the state election laws were made within the context of Bereano sending the statutes to his clients, allegedly showing what his understanding of the law was. The statements by the prosecutor implying that Bereano was actually violating the law represented a minor portion of an extensive argument and were reported within a three-page span of the transcript of the closing argument which totalled forty pages. Finally, the trial judge, who was in the best position to weigh this issue, gave a limiting instruction that the Maryland election laws only went to prove Bereano's motive and intent. There is a presumption that a jury will follow a district court's limiting instruction. *See United States v. Powers*, 59 F.3d 1460, 1468 (4th Cir. 1995) (emphasizing that limiting instructions generally obviate any prejudice), *cert. denied*, 516 U.S. 1077 (1996); *United States v. Salva*, 745 F.2d 840, 844 (4th Cir. 1984) (same), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1404, 84 L.Ed.2d 791 (1985). The trial judge was correct in holding that the Maryland election laws were irrelevant in proving mail fraud violations. When the veil of the Maryland election laws is lifted from the evidence, it reveals a clearly visible scheme to fraudulently bill clients for unauthorized political contributions. Whether the election law evidence should have been admitted to show motive and intent presents a close question, but the evidence of mail fraud against Bereano is clear. Therefore, even if the trial court erred in

admitting the election law evidence, given its instructions to the jury, any possible error was harmless. Bereano's understanding of the election laws arguably explains his motive and intent for choosing the particular scheme which he utilized. Further, Bereano asserted a defense of good faith. This evidence may be probative of bad motive or intent as opposed to good faith.

B.

In reviewing a claim of prosecutorial misconduct, the Court reviews the claim to determine whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Morsley*, 64 F.3d 907, 913 (4th Cir. 1995) (citations and internal quotation marks omitted), *cert. denied sub nom., McKoy v. United States*, 516 U.S. 1065 (1996). This Circuit has held "'that the test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor's remarks or conduct must in fact have been improper and (2) such remarks or conduct must have prejudicially affected Bereano's substantial rights so as to deprive the defendant of a fair trial.'" *United States v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993) (quoting *United States v. Brockingham*, 849 F.2d 872, 875 (4th Cir. 1988)) (quoted in *United States v. Chorman*, 910 F.2d 102, 113 (4th Cir. 1990)); *Morsley*, 64 F.3d at 913. This Court has noted a number of factors in evaluating the issue of prejudice to Bereano, namely "'(1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.'" *Mitchell*, 1

F.3d at 241 (citing *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983) (quoted in *Chorman*, 910 F.2d at 113)), *cert. denied*, 466 U.S. 972 (1984); *Morsley*, 64 F.3d at 913.

"It is often said and often forgotten that the duty of a prosecuting attorney is not to convict defendants but to try them fairly. Absolute fairness is a counsel of perfection. But the prosecutor should hold himself to the highest practicable standard of fairness." *McFarland v. United States*, 150 F.2d 593, 594 (D.C. Cir. 1945). Bereano argues that prosecutorial misconduct occurred in that the prosecution first argued that the state election laws were immaterial to mail fraud, but then relied upon the same state election laws in opposing his motion for judgment of acquittal and in arguing that Bereano was guilty during closing arguments. Bereano asserts that this is prosecutorial overreaching and that "such references were a culmination of a string of errors which permeated the trial."

Prosecutorial misconduct warrants the reversal of a conviction only in rare and egregious cases. For example, a conviction was overturned when the prosecution prejudiced the appellant's substantial rights by repeatedly referring to a conviction of another participant in the same conspiracy and the appellant's relationship to that co-conspirator. *See Mitchell*, 1 F.3d at 241-44. The Court based its conclusion on such factors as calling into question evidence not before the jury, the prosecution's case could withstand a sufficiency of evidence challenge but was not overwhelming, the prosecution deliberately made improper comments before the jury in order to divert the jury's attention, and the district court failed to give a limiting instruction to the jury. *See id.* at 241-42. In contrast, no reversible error was found when the prosecution told the jury that Bereano [*sic*] used different names and inferred that Bereano [*sic*] had been charged with

murder and rape previously, neither of which were true; the prosecution said in opening statements that even a condemned man gets a last meal while the victim did not; and the victim's bloodstained underclothes were kept conspicuously displayed for several hours. *See McFarland*, 150 F.2d at 593-94.[7] When evaluating the factors identified

---

[7] More recent examples of circumstances not warranting reversal include: *United States v. Burns*, 104 F.3d 529, 537 (2d Cir. 1996) (holding that prosecution's applauding after defense counsel's summation was not prosecutorial misconduct because there were curative instructions given and sufficient evidence to convict without the misconduct); *United States v. Collins*, 78 F.3d 1021, 1039-40 (6th Cir. 1996) (holding instances of laughter, gestures and facial expressions by prosecutor may have been improper, but fell far short of reversible error), *cert. denied*, --- U.S. ---, 117 S.Ct. 189 (1996); *Mills v. Singletary*, 63 F.3d 999, 1013-14 (11th Cir. 1995) (holding prosecutor's pretrial solicitation of comments about potential jurors from county sheriff, deputy sheriff, bailiff, clerk of court and victim's father was not prosecutorial misconduct because the conduct was not brought to the attention of anyone on venire list), *cert. denied*, 517 U.S. 1214 (1996); *United States v. Wiley*, 29 F.3d 345, 351-52 (8th Cir.) (characterization of defendant as a "criminal" and "drug dealer" did not deprive defendant of a fair trial), *cert. denied*, 513 U.S. 1005 (1994); *United States v. Chambers*, 944 F.2d 1253, 1272 (6th Cir. 1991) (holding no prosecutorial misconduct occurred when prosecution drew picture of courtroom indicating where drug defendant was sitting and nodded and winked to government witness during her testimony), *cert. denied*, 502 U.S. 1112 (1992); *Grochulski v. Henderson*, 637 F.2d 50, 53-54 (2d Cir.) (holding that although prosecutor visited homes of various alibi witnesses in order to obtain statements about their forthcoming testimony, visits were limited to minimum necessary and occurred only because defendant had notified prosecution of its intent to put witnesses on stand at a time later than that fixed by New York statute governing adversary notice of alibi witnesses, and therefore, there was no evidence of prosecutorial misconduct, despite claim that prosecutor intimidated witnesses), *cert. denied*, 450 U.S. 927 (1981); *United States v. Bashaw*, 509 F.2d 1204, 1205 (9th Cir. 1975) (holding prosecutor's comment during summation "that the defendant's evidence doesn't meet its burden of showing the defendant did not commit the crime charged" was improper, but was legally harmless, where district judge immediately instructed jury that it must not accept the statements of counsel as to the law, jury was carefully instructed that it rested upon the prosecution to prove defendant's guilt beyond a reasonable doubt, and evidence of defendant's guilt was overwhelming). *But see Drake v. Kemp*, 762 F.2d 1449, 1458-60 (11th Cir. 1985) (holding prosecutor's closing argument in

(Continued...)

by this Circuit in answering this question, we must first determine "the degree to which the prosecutor's remarks have a tendency to mislead the jury and prejudice the accused. . . ." *Mitchell*, 1 F.3d at 241. First, this argument was made in the context of Bereano's knowledge of the law as it tended to prove whether he had acted in good faith which is a proper purpose as noted by the trial court. Also relevant to this inquiry is whether the trial court gave a limiting instruction concerning that evidence. Unlike *Mitchell*, the judge did give a limiting instruction to the jury in this case telling them that the information concerned what Bereano knew about the election laws and what his intent was. The trial judge also redacted reference to the election laws from the indictment before it was made available to the jury. Given this limiting instruction and the redaction, the comments were not prejudicial, they did not mislead the jury and they did not prejudice the accused. Therefore, this factor weighs in favor of the Government.

Second, we must determine whether the remarks were pronounced and persistent. While several allegedly inappropriate remarks were made by the prosecution, they were made within the context of what Bereano knew the law to be, which went to motive, intent, and lack of good faith. Further, the comments were few in comparison to forty pages of transcript covering the Government's closing

---

(...Continued)
sentencing phase of capital murder prosecution, in which prosecutor cited two state Supreme Court decisions which were over 100 years old to urge jury not to consider mercy in imposing sentence, was misleading and prejudicial; as evidence implicating defendant in murder was not overwhelming, improper argument rendered sentencing hearing fundamentally unfair), *cert. denied*, 478 U.S. 1020 (1986).

argument. Finally, the trial judge recognized the issue and ruled that the prosecution's statements were proper. Therefore, this factor also weighs in favor of the Government.

Third, as for the amount of properly admitted evidence available against Bereano, the trial court described the evidence as "thin" and obscure." However, when the election law issue is put aside, the remaining evidence of fraud is clear. The alleged victims of the fraud all testified to the fact that they believe they received the full benefit of Bereano's services. However, they all testified that they did not authorize, by contract or otherwise, political contributions being charged to them. Had such victims not authorized the wining and dining of legislators, the billing of same to clients under the heading of, for example, legal research would be similarly fraudulent. Therefore, this factor also weighs somewhat in favor of the Government.

Fourth, we must assess "whether the comments were deliberately placed before the jury to divert attention to extraneous matters." *Mitchell*, 1 F.3d at 241. The knowing violation of Maryland state election laws arguably was evidence showing a lack of good faith by Bereano."[8]

The totality of the *Mitchell* factors weigh in favor of the Government, albeit some factors more than others. Accordingly the Government's argument did not "so infect the trial with unfairness as to make the resulting conviction a

---

[8] The Government made that argument in its closing statement, stating: "In deciding whether Mr. Bereano acted in good faith honestly, or whether he acted with the intent to deceive, you are entitled to consider whether he believed he was violating the state's election laws. . . ."

denial of due process." *Morsley*, 64 F.3d at 913 (citations and internal quotation marks omitted).

C.

An indictment may not be "'amended except by resubmission to the grand jury.'" *United States v. Leichtman*, 948 F.2d 370, 376 (7th Cir. 1991) (quoting *Russell v. United States*, 369 U.S. 749, 770 (1962)); *see also Stirone v. United States*, 361 U.S. 212, 215-16 (1959). If an amendment occurs, the conviction "is reversible per se." *Id.* However, an amendment to an indictment is not fatal in two circumstances. First, there is no amendment when the change is "merely a matter of form," such as a correction for a typographical or clerical error or a misnomer, a formal change to the date specified in the indictment within limits, or an inconsistency amounting to a simple matter of semantics. *Id.* Second, an indictment is not amended if "all that has happened is that the evidence or the charges submitted to the trial jury wind up being simply a more limited version of the charges in the indictment. An indictment may be narrowed, either constructively or in fact, without resubmitting it to the grand jury." *Id.*

Bereano claims there was an impermissible amendment of the indictment. A change to the indictment is an impermissible amendment if the change broadens the charges presented to the jury allowing them to consider more or different offenses than the grand jury charged. For example, if the indictment charges a RICO conspiracy among individuals "associated with an enterprise, to wit . . . the DeCavalcante Family of La Cosa Nostra," but the jury is only instructed that the defendants are associated with "an enterprise," then an amendment has occurred. *See Leichtman*, 948 F.2d at 377-78. "[T]he more general

instruction would allow the defendants to be convicted of an enterprise other than the one charged in the indictment, violating [the defendant's] right to be tried only on the charges approved by the grand jury. . . ." *Id.* at 377.

In this case, Bereano was charged with eight counts of mail fraud. References to the Maryland state election laws were redacted in two places: first, in ¶ 6, the indictment recited the provisions of Md. Code Ann. Art. 33, §§ 26-29,[9] and second, in ¶ 18(2), the indictment recited that an outcome of the previously described scheme was to allow Bereano to "(2) make political contributions in excess of the limitations imposed by Maryland election law."[10] Neither reference to the Maryland state election laws is contained within the section labeled "The Scheme and Artifice to Defraud." When redactions are made to portions of the indictment not contained within the description of the scheme, no constructive amendment has occurred. *See*

---

[9] Paragraph 6 of the indictment reads:

At all relevant times material to the Indictment, the Annotated Code of Maryland, Article 33, section 26-29 prohibited any individual or corporate entity from contributing in excess of $1,000 to any one candidate or in excess of a total of $2,500 to any group of candidates in any primary or general election for public office in the state of Maryland and prohibited any individual or corporate entity from contributing in excess of $2,500 to any Maryland state political action committee in any primary or general election.

[10] Paragraph 18 reads in full:

By means of the foregoing scheme and artifice, BRUCE C. BEREANO was able to: (1) conceal the true identities of the actual contributors of campaign funds; (2) make political contributions in excess of the limitations imposed by Maryland state election law; (3) cause candidates to file false campaign finance reports, thereby concealing the true identity of the contributor to the candidate's campaign; (4) cause his own lobbying activity reports to be false; and (5) defraud his lobbying clients of approximately $16,000 to reimburse BRUCE C. BEREANO for said political contributions.

United States v. Schnabel, 939 F.2d 197, 203 (4th Cir. 1991) ("'[T]he contested language is in a predicate paragraph and therefore is not an element of the offense charged. 'In determining whether there has been a variance between pleading and proof, it is the charging paragraphs that are to be examined.'" (quoting *United States v. Jordan*, 626 F.2d 928, 931 (D.C. Cir. 1980)). Further, the jury was instructed that violations of the state election laws could only be considered on motive and intent, the converse of Bereano's alleged good faith defense. *See Bryan*, 58 F.3d at 941-42 (holding mail fraud conviction does not require the government to establish proof of any violation of an underlying state law). Therefore, the redaction of the indictment was not prejudicial to Bereano.

V.

"A trial court has wide latitude in conducting voir dire. The court abuses its discretion only 'where the court's restriction hinders a defendant's opportunity to make reasonable use of his challenges.'" *United States v. Muldoon*, 931 F.2d 282, 286 (4th Cir. 1991) (quoting *King v. Jones*, 824 F.2d 324, 326 (4th Cir. 1987)); *see also Ham v. South Carolina*, 409 U.S. 524, 527-28 (1973); *United States v. Bakker*, 925 F.2d 728, 733 (4th Cir. 1991) ("A trial court has broad discretion to control the scope of questions during voir dire." (citations omitted)). Therefore, the standard of review for the trial court's questions in voir dire is one of harmless error, *see Muldoon*, 931 F.2d at 286, and the standard for the conduct of voir dire generally is an abuse of discretion. *See Bakker*, 925 F.2d at 733.

"It is well settled that a trial judge may conduct voir dire without allowing counsel to pose questions directly to the potential jurors" as well as "question prospective jurors

collectively rather than individually." *Bakker*, 925 F.2d at 734 (citing Fed. R. Crim. P. 24 (a)); *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991); *Wells v. Murray*, 831 F.2d 468, 472-74 (4th Cir. 1987) (individual voir dire not required in spite of public castigation of jurors for lenience in prior case). Individual questioning is especially unnecessary when the trial court "provides for individual questioning of a juror whose initial responses prove less than satisfactory and offers potential jurors the opportunity to speak with the court privately." *Bakker*, 925 F2d at 734. Lastly, "'it is not required . . . that jurors be totally ignorant of the facts and issues involved [in the case]. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *Id.* at 734 (citing *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961)).

Bereano requested extended and individual voir dire predicated on numerous newspaper articles that depicted Bereano as "the merchant of death" and "evil incarnate." The trial court denied this request. Instead, the trial judge began by asking questions to elicit whether the jurors knew of the case through media coverage. As to those members of the venire who responded to the collective voir dire, the judge questioned veniremen individually during bench conferences and allowed the attorneys to do the same. Also at those bench conferences, the judge elicited biases the jurors might have against lobbyists, and some individuals were excused on such grounds. The trial judge then asked questions to the entire venire panel to elicit any prejudices against lobbyists that may exist. The judge questioned the jurors about several aspects of political life including

lobbyists, political campaigns, and PACs.[11] No juror responded to the judge's inquiries. The voir dire of the jurors lasted two days. While the length of questioning is not relevant to the determination of whether voir dire was proper, *see Bakker*, 925 F.2d at 733, it is an indication of the thoroughness of the trial judge in inviting the jurors to communicate any potential problems they might have had.

The process used by the trial judge was identical to the process used in *United States v. ReBrook*, 58 F.3d 961, 969 (4th Cir.), *cert. denied*, --- U.S. ---, 116 S.Ct. 431 (1995) and *United States v. Bakker*, 925 F.2d 728, 733 (4th Cir. 1991). In *ReBrook*, the defendant was concerned with prejudicial pretrial publicity. *Id.* The trial court questioned the potential jurors generally about pretrial publicity, their knowledge of the defendants and related matter. *Id.* The court individually questioned potential jurors whose responses suggested prejudice. *Id.* This Circuit found that

---

[11] The trial judge presented the following two questions: "The first question is whether you hold any particular opinion or opinions about lobbyists or the practice of lobbying elected officials that might affect your ability to render a fair and impartial verdict in this case? And along with that, although it is not necessarily tied to it, is the question as to whether you hold any opinion or opinions about Political Action Committees, or the making of political contributions again that might affect your ability to be fair and impartial with respect to a verdict in this case. If anybody has any such opinions, come on up here and express them at the bench."

There was no response to this question. The court then further inquired, asking "Is there anybody here who has any business or any social relationships with any lobbyists?" When a juror responded, the judge asked what the association was and whether the association would make the juror partial, to which the juror answered "Not at all, Your Honor." The judge then followed those questions with questions concerning whether any juror ran for political office or was an officer or actively involved in a campaign or political organization. There were no responses to these questions.

the process was effective in insuring a fair and impartial jury. *Id.* In *Bakker*, this Circuit held the denial of individual voir dire was proper when the court "provided for individual questioning of a juror whose initial responses prove less than satisfactory and offers potential jurors the opportunity to speak with the court privately." 925 F.2d at 734. Based upon this precedent and the circumstances of this case, no abuse of discretion occurred with respect to voir dire.

VI.

Bereano assigns error because the transcript of the grand jury testimony used to impeach O'Hearn was not admitted into evidence and the prosecution relied on the grand jury testimony in its closing arguments. Bereano first raised his objection in his motion in limine directly preceding the Government's closing argument. When a defendant objects to the manner in which evidence is presented, the issue is reviewed under the "harmless error" standard. *See* Fed. R. Crim. P. 52(a). Under Rule 52(a), "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Because Bereano objected to the use of the grand jury testimony prior to its use in closing arguments, error which may have occurred through the use of the grand jury testimony in closing arguments, if any, is reviewed for harmless error.

Federal Rule of Evidence 613 provides that:

> *(a) Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

> *(b) Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

In arguing this assignment of error, Bereano analogizes to cases involving oral statements that hold that "it is reversible error [for the Government] to fail to produce the person to whom the statement was purportedly made to contradict the witness." *United States v. Bohle*, 445 F.2d 54, 73 (7th Cir. 1971); *see also United States v. Harris*, 542 F.2d 1283, 1307 (7th Cir. 1976). However, there is a clear difference between using prior inconsistent oral statements and transcribed prior inconsistent statements under oath. Therefore, there is a distinction between cases governing oral statements and the present situation.

The transcribed grand jury testimony could have been admitted into evidence if defense counsel had objected at the time O'Hearn testified. However, this omission was not error. First, Bereano had an opportunity to clarify the grand jury testimony. Further, the Government had a copy of the statement available if the defense had requested a copy. *See United States v. McCall*, 85 F.3d 1193, 1197 (6th Cir. 1996) (noting it is proper for the Government to present the prior inconsistent statements during cross-examination); *United States v. Hudson*, 970 F.2d 948, 955 (1st Cir. 1992) (holding Rule 613 does not "require that the witness be confronted with the statement while on the witness stand, but rather, only that the witness be available to be recalled in order to explain the statement during the course of the trial.") (citations omitted). However, no request for a copy was

made. Likewise, instead of objecting to the failure of the Government to admit the grand jury transcript while O'Hearn was testifying, the defense remained silent concerning the incident until after both parties had rested. The issue was raised for the first time directly before the Government's closing argument. Bereano gave the court no opportunity to correct any allegedly improper admission of evidence.

Second, the Government correctly followed the procedure laid out in Federal Rule of Evidence 613 that deals with prior statements. It properly laid a foundation for the statement. On cross-examination, O'Hearn was asked and denied that there was any practice or policy at the firm to bill the clients fraudulently. On redirect, O'Hearn claimed she could not recall whether Bereano instructed her to bill political contributions as reimbursement expenses. The Government then read questions and answers from her grand jury testimony in which she testified that Bereano gave her instructions regarding how to bill clients for these political contributions. When asked if she remembered giving these answers to the grand jury, O'Hearn testified that she could not remember. O'Hearn's lack of memory concerning her prior inconsistent statements can be construed as either a denial or an admission of her prior statements. Therefore, use of the grand jury testimony was proper impeachment evidence[12] and the Government relied upon it in its closing

---

[12] This Circuit also permits grand jury testimony to be used as substantive evidence under Federal Rules of Evidence 801(d)(1)(A) or 803(24). Grand jury testimony can be used as substantive evidence under Federal Rules of Evidence 801(d)(1)(A) if declarant is subject to cross-examination at trial. *See United States v. Stockton*, 788 F.2d 210, 219 n.14 (4th Cir. 1986) ("Simmons' prior testimony before the grand jury would be hearsay, were it not for Fed. R. Evid. 801(d)(1)(A), which exempts from the definition of hearsay prior inconsistent

(Continued...)

argument as such. The Government recounted O'Hearn's earlier testimony that Bereano never directed her to bill expenses as legislative entertainment. The Government then read her earlier grand jury testimony which directly contradicted her trial testimony and emphasized that "somehow, somehow Sandra Steed O'Hearn could not remember that" and that "she had forgefulitis." The Government concluded by arguing that O'Hearn was either lying before the grand jury or at trial and that the jury could infer that "[s]he was lying to protect Bruce Bereano." Accordingly, the Government's reference to O'Hearn's grand jury testimony was proper impeachment evidence and no error occurred.

VII.

The Government objects to the trial court's determination that there was only $600 of "loss" to these victims as that term is defined under the Sentencing Guidelines. We review de novo the district court's legal interpretation of the term "loss" under the Sentencing Guidelines as well as the factors

---

(...Continued)
statements made by a witness at trial, if those statements were made 'under oath subject to the penalty of perjury at a trial, hearing, or other proceeding.' Testimony before grand jury falls within the scope of the rule."); *United States v. Grandison*, 780 F.2d 425, 431 (4th Cir. 1985) (holding grand jury testimony admissible to protect against "turncoat" witness), *cert. denied*, 459 U.S. 934 (1990); *United States v. DiCaro*, 772 F.2d 1314, 1321 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); *United States v. Murphy*, 696 F.2d 282, 284 (4th Cir. 1982) (holding grand jury testimony is admissible under Rule 801(d)(1) if declarant testifies at trial and is cross-examined and if the grand jury testimony was given under oath), *cert. denied*, 461 U.S. 945 (1983). However, this Court holds that the grand jury testimony was properly relied upon only as impeachment evidence, and there is sufficient evidence to support Bereano's conviction without considering O'Hearn's grand jury testimony as substantive evidence.

the court considers. *See United States v. Castner*, 50 F.3d 1267, 1274 (4th Cir. 1995); *United States v. Reddeck*, 22 F.3d 1504, 1511 (4th Cir. 1994); *United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995). However, "'to the extent that the determination of the amount of loss is a factual matter, we review only for clear error.'" *Castner*, 50 F.3d at 1274 (quoting *United States v. West*, 2 F.3d 66, 71 (4th Cir. 1993)).

Loss is defined as the "value of the money, property, or services unlawfully taken." U.S. Sentencing Guidelines Manual § 2F1.1, comment. (n.7) (1995). The Guidelines further provide that "the loss need not be determined with precision. The court need only make a reasonable estimate if the loss. . . ." USSG § 2F1.1, comment. (n.8). However, "[t]he cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction." USSG § 2F1.1, comment. (n.6).

The trial court noted several reasons to support its holding that no enhancement for loss sustained was warranted. These reasons, noted as follows, were improperly considered in determining whether a loss enhancement is warranted: (1) the clients may have benefitted from the fraud,[13] (2) the

[13] *See Castner*, 50 F.3d at 1276 (notwithstanding the alleged benefit to clients, "the payment fraudulently obtained in excess of the amount to which a defendant is legally entitled . . . is [the] measure of the amount of loss for sentencing purposes" and the argument that loss occurred because parts were received faster and cheaper was irrelevant); *United States v. Rothberg*, 954 F.2d 217, 219 (4th Cir. 1992) (reversing the trial court's decision that because the bank could benefit in the future by collecting on the existing collateral underlying a false loan application, the amount of loss was too speculative).

assertion that Bereano received little benefit,[14] and (3) the clients' desire that Bereano should be dealt with leniently.[15]

In addition, the trial court found that the Government failed to establish that $16,000 of loss was sustained as opposed to $600. When requesting a sentencing enhancement, the Government bears the burden of proving, by a preponderance of the evidence, the victim's losses. *See Reddeck*, 22 F.3d at 1512. In support of that determination, we agree that the Government's factual evidence failed in several ways. First, many of the check stubs and other documents showing that the clients had been falsely billed were not presented to the sentencing court. Even if they had been, the total amount of all the check stubs submitted at trial was $1300 and only two of these stubs, totaling $600, clearly showed that the reimbursements paid would be billed to the clients as "legislative entertainment." Second, many of the documents showing which clients were billed for which portions of the political contributions were destroyed.[16] The bills do not note justifications for the

---

[14] *See United States v. Campbell*, 42 F.3d 1199, 1205 (9th Cir. 1994) ("We do not subtract the costs of pulling off the caper when we calculate the value of the stolen property."), *cert. denied*, 514 U.S. 1091 (1995); *United States v. Schweizer*, 5 F.3d 44, 47 (3d Cir. 1993) (refusing to deduct the amount of the bribe paid in calculating benefit under the guidelines).

[15] *See Reddeck*, 22 F.3d at 1512 (holding the sentencing guidelines do not provide for "an abstract factoring of a victim's residual and subjective 'satisfaction.' Calculation of lost value requires an objective standard, usually measured by the 'fair market value.'" (*citing* USSG § 2B1.1, comment. (n. 2)).

[16] After inquiries were made by a legislator concerning one of Bereano's contributions, many of O'Hearn's notes designating which clients were billed for which contributions were destroyed for some fear of discovery. The few notes that survived became the basis for these mail fraud allegations. The Government asserts that other allegations of overbilling, i.e., that a total of $16,000 worth of overbilling occurred, were not criminally pursued because, though the

(Continued...)

various "legislative entertainment" expenses, but there was no connection proven between specific contributions and specific "legislative entertainment" charges beyond the two specific check stubs totaling $600. Finally, there was evidence of computer printouts noting that political contributions were "billed off," implying that clients were billed improperly for these expenses, but there was testimony alleging that not all items marked billed off in the computer meant that clients were billed for those expenses. Based upon the insufficiency of the Government's evidence, the trial court's refusal to enhance Bereano's sentence based on losses over $10,000 is affirmed.

VIII.

The Government also noted its objection to the trial court's reasoning for downwardly departing. Previously, this Court applied a multi-part analysis which involved:

> (1) a *de novo* standard [of review] to determine whether the reasons the district court used to support its departure encompassed a factor not adequately taken into consideration by the Sentencing Commission in formulating the guidelines, (2) a clearly erroneous standard to review whether the district court had adequate factual support to depart on the basis of the factor, (3) an abuse of discretion standard to determine whether the

---

(...Continued)
Government had evidence in the form of check stubs and client bills that overbilling had occurred, the destruction of the notes in regard to those transactions made the specifics of who was overbilled on which occasions most difficult to prove beyond a reasonable doubt. As noted above, only two check stubs clearly showed that clients were billed for political reimbursements and those two stubs totaled only $600.

> factor is of sufficient importance to justify a sentence outside the guideline range, and (4) an abuse of discretion standard to review whether the extent of the departure was reasonable.

United States v. Hairston, 96 F.3d 102, 106 (4th Cir. 1996) (citations and internal quotations omitted). However, *Koon v. United States*, --- U.S. ---, 116 S.Ct. 2035, 2048 (1996), abolished the "de novo" review under the above multi-layered test and substituted a "unitary abuse of discretion standard." This "unitary abuse of discretion standard" includes:

> a legal analysis as to whether the Commission listed certain factors as forbidden, discouraged or encouraged departure bases. We do not accord a district court's legal conclusions on these questions any particular deference. However, we do defer to a sentencing court's fact-based determination as to whether the presence of a suggested feature removed a case from the "heartland" for which the guideline was designed. Because "[a] district court by definition abuses its discretion when it makes an error of law," our overall review is thus for abuse of discretion.

Hairston, 96 F.3d at 106-07 (citing *Koon*, --- U.S. at ---, 116 S.Ct. at 2048); *see also United States v. Rybicki*, 96 F.3d 754, 757 (4th Cir. 1996); *United States v. Brock*, 108 F.3d 31, 33 (4th Cir. 1997) ("The [*Koon*] Court explained that when assessing whether a potential basis for departure was adequately considered by the Commission in formulating the guidelines, the correct inquiry necessarily focuses on whether the factor is addressed by the guidelines, policy statements, or official commentary and whether it is encompassed within the heartland of situations to which the

guidelines were intended to apply." (citing *Koon*, --- U.S. at ---, 116 S.Ct. at 2044-45)).

The reasons given by the trial court justifying the downward departure in essence are two-fold: (1) Bereano did not profit from his crime; and (2) the victims do not feel defrauded. Using the above standard of review, we must review the use of these factors for any legal errors constituting an abuse of discretion.

Defendant's first argument is akin to this court's reasoning in *United States v. Seacott*, 15 F.3d 1380 (4th Cir. 1994). In that case, the district court reasoned that the Guidelines did not take into account the possibility that a defendant would be motivated by reasons other than his own personal gain in the context of misapplying funds in violation of 18 U.S.C. § 657 (1994). *See id.* at 1387. We held that such reasoning was a "legally insufficient reason to depart from the applicable Guidelines range." *Id.* There, as here, a departure based on the belief that a crime was committed "without concern for [a defendant's] own economic self-interest" is clear error. *Id.* The Guidelines consider both harm to the victim and gain to the defendant, and therefore, a lack of profit motive reason used to depart is in direct contravention to the Guidelines. *See id.* "The same amount has been taken from the victim no matter what the fate of the funds. The aim of the criminal law in this area is to deter misapplication of funds for any reason." *Id.* Therefore, reliance on this factor is legal error.[17] As to the

[17] It is difficult to accept the proposition that Bereano did not benefit, as the amount of political contributions was a part of the "overhead" of his lobbying practice. The result would be the same if he billed his clients for office rent or car payments under the heading of "legislative entertainment."

perceptions of the victims, the Guidelines contain several provisions for adjustments to a sentence based on the effect of the crime on a victim. *See, e.g.*, USSG §§ 5K2.1, 5K2.2, 5K2.3, 5K2.4, 5K2.8, and 5K2.10. None of these provisions, however, justify a departure when the victim allegedly does not perceive being wronged. The Sentencing Commission considered enhancement for aggravating circumstances, and downward departures for lesser harms. Further, the trial court considered the victims' perceptions when deciding not to enhance the loss calculation. Since we have found that this factor should not be considered in enhancing the loss calculation, double counting is no longer an issue. However, we find that the use of that factor as a basis for granting a downward departure is also impermissible. *See United States v. Ellen*, 961 F.2d 462, 468 (4th Cir.), *cert. denied*, 506 U.S. 875 (1992). The trial court relied upon this factor when it stated

> I am limiting the [downward] departure to only two-levels, because I find some merit to the concerns that have been expressed by the Government. One [concern] as Mr. Kelberman put it [is] we are riding the same horse to some extent by reason of the fact that no loss enhancement was applied [due to the victims' statement that they did not feel defrauded.]

In light of the *Koon* decision, which this Court notes post-dated the trial court's ruling, the trial court relied upon impermissible reasons for granting a downward departure. Accordingly, sentencing is vacated and remanded for the district court's reconsideration.

IX.

In conclusion, we affirm the jury's verdict and the district court's upholding of this verdict which finds Bereano guilty

of mail fraud. The evidence is sufficient to uphold conviction under either 18 U.S.C. § 1341 or § 1346; the Maryland election laws were irrelevant and if their presentation to the jury was error, it was harmless error; there was no abuse of discretion in the voir dire procedure employed; and the use of grand jury testimony was proper impeachment evidence and was not error. Further, the district court did not err in calculating the loss sustained in regard to the sentence enhancement sought by the Government. Based upon recent precedent, however, we hold that the district court abused its discretion in granting a downward departure. Accordingly, Bereano's sentence is vacated, and his sentencing is remanded to the district court for reconsideration in light of *Koon*, *Rybicki*, and this Court's findings.

AFFIRMED IN PART AND VACATED AND REMANDED AS TO SENTENCING

WILSON, Chief District Judge, concurring in part and dissenting in part:

I concur with the majority's opinion except for part VI, in which the majority concludes that the district court properly permitted the government to read extremely damaging, and I believe clearly unadmitted, grand jury testimony during closing argument. I, therefore, respectfully dissent from this part of the opinion.

The rule that guides my dissent is quite basic: counsel may not read to the jury in closing argument material not in evidence. *See Graham v. United States*, 257 F.2d 724, 730 (6th Cir. 1958); *see also United States v. Morsley*, 64 F.3d 907, 913 (4th Cir. 1995) ("The prosecutor's statement that McKoy had pled guilty to Count 91 when no such fact was in evidence was unquestionably improper."). At trial, the

government questioned Bereano's bookkeeper, Sandra O'Hearn, about Bereano's involvement in billing and about her purported grand jury testimony. O'Hearn exculpated Bereano and answered that she could not recall what she had been asked and what she had answered before the grand jury. The government never followed up by seeking to introduce that testimony. In closing argument, however, the government read the unadmitted, purported grand jury testimony at length and commented:

> Now, if you don't believe her, *and you have good reason not to believe her because her testimony was diametrically opposed to what she said in the Grand Jury*, you then have to ask yourself the next question. Well, if she's lying, who is she lying for and why is she lying? That one you can figure out. She wasn't lying to help the government. She was lying to protect Bruce Bereano. An innocent man, ladies and gentlemen, does not need a bookkeeper to lie for him.

(emphasis added). I would find no fault had the prosecutor argued that O'Hearn's memory lapse was less than candid. However, he read O'Hearn's purported grand jury testimony as established fact and argued that it flatly contradicted her trial testimony. O'Hearn appears to have been a key player in these events, and the assertion that her trial testimony was diametrically opposed to her grand jury testimony was a powerful argument. The argument is more than problematic, however, because the court never admitted her grand jury testimony at trial, and the testimony is not even a part of the record in this court. Thus, all we have is the prosecutor's questions and O'Hearn's response that she could not remember neither the questions nor her answers before the grand jury. This exchange produced not even a scintilla of evidence to support the argument that O'Hearn's grand jury

testimony conflicted with her trial testimony.[1] Because I cannot conclude on this record that the error did not affect the outcome of the trial, I respectfully dissent.[2]

---

[1] I also dissent from the second sentence of the third paragraph on page 5 of part I, in which the majority states: "O'Hearn testified before the grand jury that Bereano instructed her to bill his lobbying clients for a pro-rated portion of various political contributions under the category of legislative expenses." I dissent from this characterization because, as stated above, the grand jury testimony was not admitted and is not a part of the record before us.

[2] The majority states that O'Hearn's failure to recollect her grand jury testimony could be construed "as either a denial or an admission of her prior statements," and that the government therefore could use the grand jury testimony for impeachment purposes. I do not agree that the jury, simply from O'Hearn's failure to recollect a series of statements made 18 months earlier, could infer that she made the statements *as recited by the government*. *See Bingham v. Zolt*, 66 F.3d 553, 566 (2d Cir. 1995) (noting, in rejecting party's argument that the jury improperly was allowed to infer that he was lying, that "[i]n a sidebar, the trial judge did note that the jury could infer Zolt was lying. However . . . the judge meant that the jury could credit documentary evidence where Zolt claimed not to remember . . . [and] at no time did the judge instruct the jury that a witness's inability to recall constituted evidence of the facts asserted in an attorney's question.").

Additionally, the government used the purported grand jury testimony, not only for impeachment purposes, but also for its substantive content. The government referenced O'Hearn's testimony in the context of attempting to prove Bereano's knowledge and participation in the billing scheme, and stated that "like it or not, Miss O'Hearn's testimony helps our case immeasurably." The word "testimony" in this sentence could refer only to O'Hearn's grand jury testimony, because O'Hearn testified at trial that Bereano had not directed a scheme to bill the clients for the political contributions. This use of the grand jury testimony, even under the majority's analysis, was improper.

Finally, the fact that the grand jury testimony could have been admitted at trial, as the majority points out, is irrelevant. Having failed to enter the testimony into evidence, the government could not base its closing argument upon it. *See Johnson v. United States*, 347 F.2d 803, 805 (D.C. Cir. 1965) ("It is elementary . . . that counsel may not premise arguments on evidence which has not been admitted.").

[November 1, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Criminal Action No.
	:	WN-94-0208
BRUCE C. BEREANO	:	

MEMORANDUM

Pending before the Court is the Government's Motion in Limine to preclude evidence relating to (1) the investigation of the Maryland lottery contract; and (2) interpretations or amendments to the 1990 Maryland election laws by individuals other than Defendant or individuals involved in the alleged scheme to defraud. (Paper No. 34). The Defendant has opposed. (Paper No. 35). Upon a review of the pleadings and after consideration of the arguments presented at a hearing on October 28, 1994, the Court will grant the Government's Motion in Limine.

I. The Investigation of the Maryland Lottery Contract

Defendant seeks to introduce evidence relating to the Government's investigation of the Maryland lottery contract because it is relevant to "challenging the very inferences inherent in the inception of the Government's case." Defendant's Opposition to the Government's Motion in Limine ("Defendant's Opposition") at 4. The Government contends that the investigation of the Maryland lottery contract is irrelevant to the charges in this case, and should therefore be excluded.

A similar issue was presented in *United States v. Burge*, 990 F.2d 244 (6th Cir. 1992). There, the defendant sought to introduce evidence that the prosecution brought bribery charges against him because of his refusal to cooperate. *Id.* at 248. The trial judge precluded inquiry into the government's motivation for bringing the charges. *Id.* The Sixth Circuit affirmed the trial judge's ruling. While the court in *Burge* did not adopt the government's argument that evidence of the government's motive for bringing the charges is relevant only to a claim of vindictive prosecution, it held that the trial judge properly precluded evidence of the government's motives for prosecuting the case, reasoning that this evidence did not, in any significant way, cast doubt on the government's case. *Id.* at 249. In affirming the district court's decision, the court recognized the wide latitude accorded a trial judge in ruling on evidentiary matters, and also noted that the evidence excluded had a potential to confuse the jury as to the issues in the case. *Id.*

The Court finds this reasoning persuasive in this case. Here, the issue for resolution at trial is whether Defendant knowingly participated in the scheme to defraud as charged in the Indictment. In order for this evidence to be relevant, "it must be sufficiently related to the charged offense." *United States v. Rawle*, 845 F.2d 1244, 1247 n.3 (4th Cir. 1988). The manner in which the Government discovered Defendant's alleged illegal conduct is not sufficiently related to the charged offense in this case; it does not shed any light on the Government's allegation that Defendant knowingly participated in the alleged scheme to defraud. Assuming *arguendo* that the evidence is relevant, its probative value is substantially outweighed by the potential to confuse the jury as to the issues in the case. *See* Fed. R. Evid. 403.

In support of his argument that evidence relating to the Maryland lottery investigation should be admitted at trial, Defendant relies on the principle that a criminal defendant is entitled to every inference in his favor which can reasonably [be] drawn from the evidence. *See* Defendant's Opposition at 4. This reliance is misplaced. The well-established principle that Defendant cites presupposes that a court has already made a determination as to the relevance of the evidence. As noted above, the Court finds that the evidence relating to the Government's investigation of the Maryland lottery investigation is not relevant to any fact of consequence in this case. Accordingly, this evidence should be excluded.

II. Maryland State Election Law Interpretations or Amendments

On June 22, 1994 Defendant filed a Motion to Dismiss the Indictment, alleging, *inter alia*, that the Indictment wrongly characterized Maryland law. The Court ruled, in accordance with well-settled law, that violations of state law are immaterial to proving the elements of mail fraud. *See* Memorandum and Order dated August 18, 1994 at 8-9. However, the Court also recognized that violations of state law are relevant in demonstrating motive and intent. *Id.* Accordingly, the Government seeks to introduce evidence of Defendant's understanding of the election laws in effect at the time of the alleged scheme to defraud to establish Defendant's intent to engage in the scheme. Defendant now seeks to offer evidence relating to the interpretation of Maryland's election laws, including the 1987 Report of the Government's Commission to Review the Election Laws and newspaper articles discussing violations of Maryland's election laws to establish that Maryland's election laws are "vague and ill-defined." *Id.* at 4.

The issue in this case, as the Court will instruct the jury, is whether Defendant knowingly participated in a scheme to defraud, *not* whether Defendant violated Maryland's election laws. Therefore, any evidence relating to the "correct" interpretation of Maryland's election laws, by either the Government or Defendant, is irrelevant. As the Court has already indicated, evidence of *Defendant's* understanding of the election laws in effect at the time of the alleged scheme to defraud is relevant and admissible to establish motive and intent. However, how others who were not involved in the alleged scheme to defraud interpreted the law is in no way probative of Defendant's motive or intent, and should therefore be excluded. A separate Order will issue.

/s/_____
William M. Nickerson
United States District Judge

Dated: November 1, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Criminal Action No.
	:	WN-94-0208
BRUCE C. BEREANO	:	

ORDER

In accordance with the foregoing Memorandum and the reasons stated therein, and for the reasons stated in open court on October 28, 1994, IT IS this 1st day of November, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant's Motion in Limine to Preclude Testimony of Other Transactions, Wrongs, or Acts (Paper No. 24) IS GRANTED;

2. That Defendant's Motion in Limine to Preclude Reference to State Law (Paper No. 25) is DENIED;

3. That Defendant's Motion to Set Date for the Government to Advise Him of Its Intention to Introduce Rule 404(b) Evidence is DENIED AS MOOT;

4. That Defendant's Motion for Extended and Individual Voir Dire (Paper No. 30) is DENIED;

5. That Defendant's Motion in Limine to Preclude Reference to Client Bills Not Identified in the Indictment (Paper No. 36) is DENIED;

6. That Defendant's Motion for a Protective Order (Paper No. 37) is DENIED;

7. That the Government's Motion in Limine (Paper No. 34) is GRANTED; and

8. That the Clerk of the Court mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/_____
William M. Nickerson
United States District Judge

[August 18, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Criminal Action No.
	:	WN-94-0208
BRUCE C. BEREANO	:	

MEMORANDUM

On May 26, 1994, a grand jury returned an eight count indictment against Defendant, an attorney and lobbyist, charging him with mail fraud and aiding and abetting in violation of 18 U.S.C. §§ 1341, 1346, and 2. Subsequently, Defendant filed the following pre-trial motions: (1) a motion to dismiss the indictment, (2) a motion for a bill of particulars, (3) a motion to strike surplusage from the indictment, (4) a request for discovery and motion to produce documents, and (5) a motion for notice of the government's intention to use evidence at trial. Upon consideration of the pleadings and the applicable case law, the Court determines that a hearing is not necessary (Local Rule 105.6) and that Defendant's motion to dismiss the indictment will be denied; Defendant's motion for a bill of particulars will be granted in part and denied in part; Defendant's motion to strike surplusage from the indictment will be denied; Defendant's motion for discovery and to produce documents will be denied without prejudice; and Defendant's motion for notice of the government's intention to use evidence at trial will be denied.

BACKGROUND

Defendant is an employee and principal in the law firm of Bereano & Resnick, P.A., a Maryland professional corporation. During the period material to the indictment, Defendant was a registered lobbyist with the Maryland State Ethics Commission. The indictment alleges that, as a lobbyist before the Maryland legislature, Defendant "owed a fiduciary duty to each of his lobbying clients to act honestly and faithfully for and on behalf of the clients." Indictment at ¶ 3. The indictment alleges that Defendant was the chairman of the Bereano Political Action Committee ("PAC") and controlled all disbursements from the PAC. The PAC was "formed to support and/or oppose candidates for public office in the state of Maryland." *Id.* at ¶ 5.

The indictment charges that between May 1990 and June 1991, Defendant devised a scheme to defraud his lobbying clients of money and property by means of false and fraudulent pretenses, representations and promises. Specifically, the indictment alleges that Defendant billed his lobbying clients for expenses and services never incurred in order to repay political contributions. *Id.* at ¶¶ 17-18.

The essence of the alleged scheme was that Defendant would request his employees and family members to make political contributions to the campaigns of various candidates for public office in Maryland with a promise to reimburse the contributors for the full amount. Defendant reimbursed them with funds obtained from clients through false billing. The indictment also alleges that through this scheme, Defendant deprived his "lobbying clients of their right to the loyal, faithful, honest, and unbiased service and performance of the duties of the defendant in his capacity as [their] agent." *Id.* at ¶ 7(b).

I. DEFENDANT'S MOTION TO DISMISS

Defendant claims that the indictment against him should be dismissed because (1) it fails to sufficiently allege a violation of 18 U.S.C. § 1346, (2) all counts incorporate incorrect assertions about Maryland's elections laws and are subject to the statute of limitations pertaining to those laws, and (3) 4 of the 8 counts are multiplicitous.

A. Insufficient Allegation of a § 1346 Violation

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . ." U.S. Const. amend. V. The right to indictment affords "persons rightfully suspected of crimes with formal notice of the accusations against them, and an opportunity to prepare to meet those charges." *U.S. v. Mills*, 995 F.2d 480, 486 (4th Cir.), *cert. denied*, 114 S. Ct. 283 (1993). The indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). *Id.* The indictment "need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement." *Id.* On the contrary, the indictment may simply be a short, plain statement of the charge, sufficiently precise to notify the defendant of the accusation he must meet and to protect him from double jeopardy. *U.S. v. American Waste Fibers Co., Inc.*, 809 F.2d 1044, 1046 (4th Cir. 1987).

The Fifth Amendment requires that an indictment be valid enough on its face to call for a trial on the merits. *Costello v. U.S.*, 350 U.S. 359, 363 (1956). In considering a defendant's motion to dismiss an indictment challenging the sufficiency of the indictment, the Court views the evidence in the "light most favorable to the Government . . . and must

accept as true the allegations of the indictment." *U.S. v. ReBrook*, 837 F. Supp. 162, 166 (S.D. W. Va. 1993) (citing *Mills*, 995 F.2d at 489). The Court is to test whether the "indictment sufficiently charges the offenses it sets forth against Defendant." *Id.* (citing *U.S. v. Sampson*, 371 U.S. 75, 78-79 (1962)). The Supreme Court stated that "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" *Hamling v. U.S.*, 418 U.S. 87, 117 (1974) (citing *U.S. v. Carll*, 105 U.S. 611, 612 (1882)).

The indictment charges Defendant with violations of 18 U.S.C. §§ 1341, 1346, and 2. Defendant does not challenge the suffciency of the § 1341 charge, but argues that he cannot "discern from the Indictment what the § 1346 charges are or how they are measurably different than the § 1341 allegations." Defendant's Memorandum at 6-7.

18 U.S.C. § 1341 (West Cum. 1994) codifies the mail fraud statute and states in pertinent part:

> Whoever, having devised or intending to devise any *scheme or artifice to defraud*, or for obtaining money or property by means of false or fraudulent pretenses, representations . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing . . . shall be fined not more than $1,000 or imprisoned not more than five years. . . .

(emphasis added). Section 1346 defines a "scheme or artifice to defraud" as a scheme or artifice "to deprive another of the intangible right of honest services."

The enactment of § 1346 was a response to the Supreme Court's decision in *McNally v. U.S.*, 483 U.S. 350 (1987), which limited the application of the mail fraud statute to cases involving actual loss of money or property. *U.S. v. Berg*, 710 F. Supp. 438 (E.D.N.Y. 1989), *aff'd in part, rev'd in part on other grounds sub nom., U.S. v. Schwartz*, 924 F.2d 410 (2d Cir. 1991); *see also*, 134 Cong. Rec. H 11251 (October 21, 1988) (statements of Representative John Conyers, floor sponsor of the amendment).[1] Prior to the *McNally* decision, the Fourth Circuit, as well as other Circuits, applied § 1341 to include schemes designed to defraud others of intangible rights. *U.S. v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980). These rights included not only the right to honest government, *U.S. v. Silvano*, 812 F.2d 754 (1st Cir. 1987), but also fiduciary rights embodied in employer-employee and principal-agent relationships. *U.S. v. Bronston*, 658 F.2d 920 (2d Cir. 1981) (attorney concealing material information from client), *cert. denied*, 456 U.S. 915 (1982). *See also, U.S. v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983) (employee receiving kickbacks from third parties), *cert. denied*, 467 U.S. 1226 (1984); *U.S. v. Siegel*, 717 F.2d 9 (2d Cir. 1983) (embezzled company funds); and *U.S. v. Curry*, 681 F.2d

---

[1] Shortly after *McNally*, the Supreme Court held that the mail fraud statute protected not only tangible forms of property, but intangibles forms as well. *Carpenter v. U.S.*, 484 U.S. 19 (1987) (Wall Street Journal's interest in the confidentiality and timing of its columns was a property right protected by the mail fraud statute).

406 (5th Cir. 1982) (right to correct financial disclosure from political action committee chairman). By enacting § 1346, Congress made it a criminal violation to defraud anyone of an intangible right to honest services by utilizing the mails. *See U.S. v. D'Alessio*, 822 F. Supp. 1134, 1148 (D.N.J. 1993) ("Congress passed 18 U.S.C. § 1346 which overruled *McNally* to the extent that it re-allowed prosecutions based on violations of another's right to 'honest services.'").

Defendant's principal argument is that the indictment, "[i]n juxtaposition to the explicit allegation under § 1341 . . . is silent . . . as to the way in which § 1346 was allegedly violated." Defendant's Memorandum at 5. Defendant contends that the indictment "never alleges the means or ways in which the victim clients were defrauded." *Id.* The Court cannot agree. The indictment charges that Defendant, an attorney and lobbyist, devised a scheme and artifice to "defraud his lobbying clients of their right to the loyal, faithful, honest, and unbiased service and performance of the duties of the defendant in his capacity as agent of said lobbying clients . . ." Indictment at ¶ 7(b). The indictment states that the alleged scheme involved the fraudulent billing of clients under the ruse of legislative entertainment and that those funds were used to reimburse Defendant's employees and family members for campaign contributions they made at his behest. *Id.* at ¶¶ 8-16. The indictment specifies that Defendant defrauded his clients of approximately $16,000 through this scheme. *Id.* at ¶ 18(5). The indictment sets forth a "plain, concise and definite written statement of the essential facts constituting the offense charged" as required by Fed. R. Crim. P. 7(c)(1). Therefore, the indictment has adequately notified Defendant of the charges against him. *See Hamling*, 418 U.S. at 117; *see also, Mills*, 995 F.2d at 486.

B. Indictment Wrongly Characterizes Maryland Law

Defendant next argues that the "indictment wrongly characterizes Maryland's election laws and ignores the time bar to prosecutions based on alleged election law violations." Defendant's Memorandum at 11. Defendant claims that ¶¶ 6 and 13 (which are incorporated into each of the eight counts) of the indictment incorrectly state Maryland law.[2] Basically, Defendant contends that the indictment inaccurately alleges that the Bereano PAC was prohibited under Maryland law from receiving contributions in excess of $2,500. The incorrect statement of Maryland law "is clearly fundamentally unfair" and the grand jury "was substantially influenced by this false statement of the law." *Id.* at 17. Therefore, Defendant was "undeniably prejudiced." *Id.*

Defendant's arguments are without merit. Defendant acknowledges that "*[s]tate law is irrelevant* to proving the essential elements of mail fraud." Defendant's Reply at 12-

---

[2] Paragraph 6 of the indictment alleges that:

> [a]t all times material to this Indictment, the Annotated Code of Maryland, Article 33, section 26-9 prohibited any individual or corporate entity from contributing in excess of $1,000 to any one candidate or in excess of a total of $2,500 to any group of candidates in any primary or general election for public office in the state of Maryland and prohibited any individual or corporate entity from contributing in excess of $2,500 to any Maryland state political action committee in any primary or general election.

Paragraph 13 of the indictment alleges that "[i]t was further a part of the scheme and artifice to defraud that Bruce C. Bereano's family members used the money given to them by Bruce C. Bereano described in paragraph 11 to make contributions to the Bereano PAC in their own names."

13 (emphasis added). To sustain a conviction under the mail fraud statute, the government must show:

(1) the existence of a scheme to defraud;
(2) participation by defendant in the particular scheme charged with a specific intent to defraud; and
(3) the use of the mails in furtherance of the scheme.

Schmuck v. U.S., 489 U.S. 705, *reh'g denied*, 490 U.S. 1076 (1989); *U.S. v. Burks*, 867 F.2d 795 (3d Cir. 1989); *U.S. v. Murr*, 681 F.2d 246, 248 (4th Cir.), *cert. denied*, 459 U.S. 973 (1982). While violation of state law is immaterial to proving the elements of mail fraud, it may be relevant in demonstrating motive and intent. *See U.S. v. Ham*, 998 F.2d 1247, 1254 (4th Cir. 1993) ("Fraudulent intent may be inferred from the totality of the circumstances and need not be proven by direct evidence.").

In *Mandel*, defendants appealed their convictions of racketeering and mail fraud involving a scheme to bribe Governor Mandel and to conceal and misrepresent material information concerning a local race track. *Mandel*, 591 F.2d at 1347. While cautioning that the "mail fraud statute should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress," the Fourth Circuit dismissed a defense argument that the prosecution and conviction constituted an "unwarranted overextension of that statute and an impermissible federal intrusion into the political affairs of the State of Maryland." *Id.* at 1357. The court found this argument to be without merit because the purpose of the mail fraud statute is simply to prevent the use of the postal service as a means to carry out fraudulent schemes. The court reasoned that:

> [e]ven if the substance of the scheme to defraud involves matters normally within the purview of state control or regulation, once the mails are utilized to effectuate the scheme, the federal government has the right to prosecute the schemer under the mail fraud statute . . . the fact that the alleged scheme to defraud involved matters traditionally of state concern is not a defense to the prosecution.

Id. at 1358-59. The court stated that "the fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute." *Id.* at 1361 (citations omitted). *See also, U.S. v. Mandel*, 415 F. Supp. 997, 1009 (D. Md. 1976) ("the question of whether or not a certain course of conduct is punishable under state laws or regulations is entirely beside the point and immaterial to a mail fraud prosecution.") (citation omitted), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980); *U.S. v. Shamy*, 656 F.2d 951, 957 (4th Cir. 1981) (A "'scheme or artifice to defraud' within the meaning of the mail and wire fraud statutes is not limited to fraudulent schemes within the meaning of the common law or as prohibited by state law."), *cert. denied*, 455 U.S. 939 (1982); *U.S. v. Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982) ("a violation of local law is not an essential element of a scheme to defraud in contravention of 18 U.S.C. § 1341"), *cert. denied*, 461 U.S. 913 (1983). Because state law violations are irrelevant in proving mail fraud, whether the government mischaracterized Maryland election laws is immaterial.

Defendant continues his state law argument by contending that "under Maryland law, a prosecution for any alleged violation of the [Fair Election Practices Act] has

long been time barred . . ." Defendant's Memorandum at 18. Defendant is not charged under that Act and its limitations period, therefore, is irrelevant. The present indictment satisfies the 5-year statute of limitations applied to mail fraud. 18 U.S.C. § 3282; *U.S. v. Italiano*, 701 F. Supp. 205, 206 (M.D. Fla. 1988), *aff'd*, 894 F.2d 1280 (11th Cir.), *cert. denied*, 498 U.S. 896 (1990). For the same reason, Defendant's argument that the failure to inform the grand jury of the running of the Maryland statute of limitations warrants dismissal of the indictment also fails.

C. The Indictment Is Multiplicitous

Defendant argues that the indictment is multiplicitous, requiring the dismissal of four of the eight counts. Counts 1, 3, 5, and 7 each allege that Defendant knowingly and willfully caused bills to be delivered by mail. Counts 2, 4, 6, and 8 allege that as a result of the bills listed in Counts 1, 3, 5, and 7, Defendant knowingly and willfully caused his clients to use the mail to deliver checks for payment of services. Defendant claims that by structuring the counts in this manner, the government has improperly charged him twice for each single, unified transaction of one billing and payment.

The Court finds this argument to be unpersuasive. The indictment is not multiplicitous as a matter of law. Multiplicity means the "charging of a single offense in several counts." *U.S. v. Burns*, 990 F.2d 1426, 1438 (4th Cir.) (citation omitted), *cert. denied sub nom., LaForney v. U.S.*, 113 S. Ct. 2949 (1993). The danger of multiplicity is that it implicates the Double Jeopardy Clause of the Fifth Amendment which protects a defendant against multiple punishments for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (citations omitted).

In the seminal case of *Badders v. U.S.*, 240 U.S. 391 (1916), the Supreme Court held that each separate use of the mails to further a scheme to defraud is a separate offense, punishable as such under the mail fraud statute. This holding has been followed by the Circuit Courts. *See U.S. v. McClelland*, 868 F.2d 704, 706 (5th Cir. 1989) ("Each separate use of the mails to further a scheme to defraud is a separate offense."); *U.S. v. Ledesma*, 632 F.2d 670, 679 (7th Cir.) ("each mailing in furtherance of a scheme to defraud is a separate offense under 18 U.S.C. § 1341 even if there is but one scheme involved."), *cert. denied*, 449 U.S. 998 (1980); *U.S. v. Eskow*, 422 F.2d 1060, 1064 (2d Cir.) ("Since each mailing pursuant to an alleged scheme to defraud constitutes a separate offense, . . . the *indictment is not vulnerable to a claim of multiplicity.*") (emphasis added) (citations omitted), *cert. denied*, 398 U.S. 959 (1970); *see also, Mandel*, 591 F.2d at 1360; *U.S. v. Perkal*, 530 F.2d 604, 606 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976).

Upon consideration of the pleadings and the relevant case law, the Court is satisfied that the present indictment is plainly sufficient to inform Defendant of the charges against him. As stated herein, Defendant's argument in support of his motion to dismiss the indictment is without merit. Accordingly, Defendant's motion to dismiss the government's indictment is denied.

* * * * *

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the indictment is denied; Defendant's motion for a bill of

particulars is granted in part and denied in part; Defendant's motion to strike surplusage from the indictment is denied; Defendant's motion for discovery and to produce documents is denied without prejudice; and Defendant's motion for notice of the government's intention to use evidence at trial is denied. A separate Order will issue.

/s/_____
William M. Nickerson
United States District Judge

Dated: August 18, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Criminal Action No.
	:	WN-94-0208
BRUCE C. BEREANO	:	

ORDER

In accordance with the foregoing Memorandum and the reasons stated therein, IT IS this 18th day of August, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant's Motion to Dismiss the Indictment (Paper No. 8) IS DENIED;

2. That Defendant's Motion for a Bill of Particulars (Paper No. 4) IS GRANTED ONLY AS TO PARAGRAPH 18(5) of the Indictment and IS DENIED as to the rest of the motion;

3. That Defendant's Motion to Strike Surplusage from the Indictment (Paper No. 5) IS DENIED;

4. That Defendant's Request for Discovery and Motion to Produce Documents (Paper No. 7) IS DENIED WITHOUT PREJUDICE AND SUBJECT TO RECONSIDERATION in the event that counsel for Defendant and the Government submit a joint motion for stipulated discovery and production of documents on or before September 12, 1994;

5. That Defendant's Motion for Notice of the Government's Intention to Use Evidence at Trial (Paper No. 6) IS DENIED; and

6. That the Clerk of the Court mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/_____
William M. Nickerson
United States District Judge

FILED: October 22, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 95-5312, 95-5395

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

BRUCE C. BEREANO,

Defendant-Appellant.

ORDER

On September 11, 1998, Appellant submitted a Petition for Rehearing and Suggestion for Rehearing En Banc. The panel has voted to deny appellant's petition for rehearing, and no Judge on the Fourth Circuit Court of Appeals has indicated that he / she would vote to rehear the case en banc. Accordingly, appellant's petition for rehearing is **DENIED**.

The Clerk is **REQUESTED** to send a copy of this Order to all counsel of record.

It is so **ORDERED**.

/s/_____
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
October 20, 1998

STATUTORY PROVISIONS

Title 18 of the United States Code, §§ 1341 and 1346

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1346. Definition of "scheme or artifice to defraud"

For purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.